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# Appearance of Impropriety under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers

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Victor H. Kramer*

"*When dealing with ethical principles, . . . we cannot paint with broad strokes.*" (Chief Judge Kaufman of the Second Circuit)[1]

*[W]e have . . . painted with a broad brush using the color of Canon 9.*" (Judge Gurfein of the Second Circuit)[2]

## I. INTRODUCTION

The overwhelming majority of controversies that judges are called upon to decide are disputes between private citizens or between citizens and a government. Although relatively few cases arise in which judges must decide the propriety of a lawyer's rather than a client's conduct, the volume of such cases has grown dramatically in the last decade—largely in "conflict of interest" cases.[3] In deciding these conflicts questions, courts

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1. Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977) (quoting United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955)).

2. J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring).

3. Illustrative cases from the various circuits include:

*Second Circuit.* Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc); Board of Educ. v. Nyquist, 590 F.2d 1241 (2d Cir. 1979); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977); NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

*Third Circuit.* United States v. Miller, 624 F.2d 1198 (3d Cir. 1980); Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

*Fourth Circuit.* United States v. Eggleston, 495 F.2d 1370 (4th Cir. 1974) (*mem.*).

*Fifth Circuit.* Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168

have increasingly relied upon the "appearance of impropriety" standard embodied in Canon 9 of the Code of Professional Responsibility.[4]

This Article examines the federal judiciary's interpretation of Canon 9 in the ten years since its adoption by the American Bar Association (ABA). The sketchy origins of Canon 9 and the jurisprudential problems inherent in its application in federal courts are described first. The leading federal cases are then scrutinized. These cases reveal inconsistent and vague decisions that leave attorneys without any reliable guide for their conduct. Finally, this Article attempts to demonstrate how the legitimate ethical concerns arising in Canon 9 cases can be resolved under Canons 4 and 5 of the Code.[5]

## II. BACKGROUND AND JURISPRUDENCE

In 1969, the American Bar Association promulgated a new

(5th Cir. 1979); Zylstra v. Safeway Stores, Inc., 578 F.2d 102 (5th Cir. 1978); Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976).

*Sixth Circuit.* General Elec. Co. v. Valeron Corp., 608 F.2d 265 (6th Cir. 1979); *In re* Grand Jury Subpoenas, 573 F.2d 936 (6th Cir.), *appeal dismissed on other grounds*, 584 F.2d 1366 (6th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 934 (1979).

*Seventh Circuit.* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977).

*Eighth Circuit.* Arkansas v. Dean Foods Prods. Co., 605 F.2d 380 (8th Cir. 1979); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978).

*Ninth Circuit.* Gas-a-tron v. Union Oil Co., 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976).

*Tenth Circuit.* Waters v. Western Co., 436 F.2d 1072 (10th Cir. 1971).

*District Courts.* The following is a selected list of district court opinions involving Canon 9, which have not been appealed or were affirmed without opinion: Mississippi v. United States, No. 79-3469 (D.D.C. Sept. 29, 1980); Rossworm v. Pittsburgh Corning Corp., 468 F. Supp. 168 (N.D.N.Y. 1979); United States v. RMI Co., 467 F. Supp. 915 (W.D. Pa. 1979); United States v. Catalanotto, 468 F. Supp. 503 (D. Ariz. 1978); United States v. Dondich, 460 F. Supp. 849 (N.D. Cal.), *cert. denied*, 436 U.S. 906 (1978); Moritz v. Medical Protective Co., 428 F. Supp. 865 (W.D. Wis. 1977); Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348 (D. Colo. 1976); Estep v. Johnson, 383 F. Supp. 1323 (D. Conn. 1974); Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973).

4. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, *as amended* Feb. 1979 [hereinafter pertinent sections of the Disciplinary Rules or Ethical Considerations will be referred to as DR or EC, respectively].

5. For proposals to abandon the generalized approach of Canon 9, see ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 109 (discussion draft 1980). *See also* ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT 804-05 (public discussion draft 1980).

Code of Professional Responsibility[6] containing Canons, Ethical Considerations, and Disciplinary Rules.[7] The Canons "are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers"; the Disciplinary Rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[8]

Canon 9 of the 1969 Code, with minor variations, is now in effect in most of the states.[9] It provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."[10] Disciplinary Rule (DR) 9-101, under Canon 9, prohibits a lawyer from accepting private employment in a matter in which the lawyer acted in a judicial capacity or "in which he had substantial responsibility" as a "public employee."[11] The Rule also prohibits a lawyer from stating or implying "that he is able to influence improperly or upon irrelevant grounds" any judge, legislator, or public official.[12]

Although concern over "the appearance of impropriety" surfaced in ABA opinions interpreting the pre-1969 Canons,[13] the language of the present Canon 9 was not contained in any of the prior Canons of professional ethics. Since 1972, however, the Canon itself has been employed by federal courts to condemn lawyers' conduct not prohibited in the disciplinary rules.[14]

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6. ABA CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 4.

7. *Id.* at *Preliminary Statement.*

8. *Id.*

9. Eight states—Alabama, Arkansas, California, Maine, Mississippi, Montana, New Hampshire, and North Dakota—have neither adopted nor approved the Code. Kramer, *Clients, Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991, 994 n.20 (1979).

10. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9.

11. DR 9-101(A) provides: "A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." DR 9-101(B) provides: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

12. DR 9-101(C).

13. *See* ABA COMM. ON PROFESSIONAL ETHICS, Formal Opinion No. 134 (1935), *reprinted in* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS 399, 400 (1967 ed.) (attorney formerly employed by state's attorney's office could not defend persons against whom he aided in the procurement of indictments because the "public would naturally infer" that the attorney was using his previous connection with the prosecutor's office to his advantage); ABA COMM. ON PROFESSIONAL ETHICS, Formal Opinion No. 49 (1931), *reprinted in* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS 290, 292 (1967 ed.) ("If the profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but must likewise avoid the appearance of evil.").

14. *See* notes 42-129 *infra* and accompanying text.

Before considering on their merits the federal cases dealing with motions to disqualify attorneys under Canon 9, a threshold question must be addressed: what is the authority of the federal courts to rule on such motions? Chief Judge Kaufman of the Second Circuit has said that the courts have inherent power to regulate the ethical practices of attorneys appearing before them: "Although . . . no statutory authority undergirds judicial enforcement of the Code, the court's inherent power to assure compliance with these prophylactic rules of ethical conduct has not been questioned at any stage of these proceedings."[15] Judge Feinberg of the same circuit, writing five years later, was somewhat more circumspect, finding it curious that the federal judicial power to disqualify lawyers had "long been assumed without discussion."[16] Judge Feinberg did not identify the source of that power, but merely recognized that it was used "where necessary to preserve the integrity of the adversary process."[17]

The authority of the state courts to enforce compliance with the Code of Professional Responsibility appears clearer than that of the federal courts. The highest courts of most of the states and of the District of Columbia have adopted the Code by judicial order,[18] and the state courts have been said to have inherent authority to regulate their bars.[19] In addition, the legislatures of some states have expressly granted their

15. General Motors Corp. v. City of New York, 501 F.2d 639, 643 n.11 (2d Cir. 1974). A similar view was expressed by the court in Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1351 (D. Colo. 1976):

> Initially we note that there exists no statutory obligation upon the federal courts to apply the Code as enacted by any state jurisdiction or as adopted by the American Bar Association. *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1293 (2d Cir. 1975). The Code, however, does set guidelines for the professional conduct of attorneys appearing before the federal bar. *Hull v. Celanese Corp.*, [513 F.2d 568 (2d Cir. 1975)]; *Cinema 5, Ltd. v. Cinerama, Inc.*, [528 F.2d 1384 (2d Cir. 1976)]. In *United States v. Springer*, 460 F.2d 1344, 1354 (7th Cir. 1972), the court observed that the application of the Code of Professional Responsibility is a part of the court's general supervisory authority to ensure fairness to all who bring their cause to the judiciary for resolution. We shall apply the Code in that spirit of fairness.

16. Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

17. *Id.*

18. *See* note 9 *supra*. The Rules of Professional Conduct of the State Bar of California have no equivalent of Canon 9. CAL. BUS. & PROF. CODE § 6076 (West Supp. 1980). This may partly explain the absence of any Canon 9 cases from the Ninth Circuit. *But see* Gas-a-tron v. Union Oil Co., 534 F.2d 1322, 1324-25 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976) (recognizing that "a court may disqualify an attorney . . . for failing to avoid the appearance of impropriety").

19. *See, e.g.*, Lathrop v. Donohue, 367 U.S. 820, 850 n.2 (1961) (Harlan and Frankfurter, JJ., concurring).

supreme courts the authority to regulate the bar.[20] There is, however, no corresponding federal statute.

Assuming that federal judges have authority to adopt and apply to lawyers ethical principles that may disqualify them from litigation, the assumed authority raises problems of conflict between the state and federal judiciary.[21] Suppose, for example, that a motion for disqualification arises in a federal court in New York and is based on a disciplinary rule, on a Canon from the ABA Code that has not been adopted by the state of New York, or on a Canon that has been adopted but with major modifications.[22] More to the point, suppose that the ABA should decide to abolish Canon 9 insofar as it relates to appearances of impropriety, as an ABA committee has initially proposed.[23] Would federal courts have inherent jurisdiction to continue to apply Canon 9? Suppose, further, that some states adopt an ABA recommendation to abolish Canon 9 and other states do not. What would be the effect on federal courts ruling on motions to disqualify based on Canon 9? Resolution of these questions is largely beyond the scope of this Article. Nonetheless, they are raised because they suggest that federal courts—in ruling on motions to disqualify—should strive to articulate clear, precise, and consistent rules that minimize incongruities both between circuits and between the state and federal judiciary. As the discussion below demonstrates, most federal courts have used Canon 9 to move in the opposite direction—reserving wide discretion to treat ethical issues on a case-by-case basis and forcing members of the bar to risk the serious taint of disqualification, while not providing the guidance necessary to avoid such a risk.

## III. ALTERNATIVE APPROACHES IN THE FEDERAL COURTS

The federal cases that invoke Canon 9 to disqualify counsel generally arise under the rubric of conflict of interest and fall into one of four fact patterns. Typically, it is alleged that ei-

20. *See, e.g.*, WIS. STAT. § 758.25 (1977).

21. *See, e.g.*, United States v. Miller, 624 F.2d 1198 (3rd Cir. 1980). In *Miller*, the district court's Local Rule imposed the ABA Code of Conduct, as amended by New Jersey's Supreme Court, on lawyers appearing in federal court. *Id.* at 1200. By approving the district court's reading of the Local Rule, the *Miller* court sanctioned the application of a more stringent version of Canon 9 than that followed by most courts and the ABA. *See id.* at 1203.

22. *See, e.g.*, Kramer, *supra* note 9, at 994-95.

23. *See* notes 130-32 *infra* and accompanying text.

ther: (a) an attorney or a law firm concurrently represents parties with adverse or potentially adverse interests;[24] (b) an attorney for the plaintiffs in a class action is also the class representative or is related in some way to a named plaintiff;[25] (c) an attorney, or partner or associate of an attorney, has previously represented a party that is now an adverse party;[26] or (d) an attorney, or partner or associate of an attorney, formerly had substantial responsibility as a public employee in a related case or matter.[27] These situations often involve allegations under Canons 4 and 5 as well, and the frameworks of these Canons present alternative grounds upon which Canon 9 issues can be resolved.

Canon 4 states that "A Lawyer Should Preserve the Confidences and Secrets of a Client."[28] By proscribing the misuse of information acquired in the course of representation, Canon 4 promotes the trust and reliance a client must repose in his or her attorney[29] if the client is to reveal all potentially relevant information to the attorney.[30] Disciplinary Rules under Canon 4 prohibit a lawyer, or anyone with whom the lawyer works, from knowingly revealing or using the confidences or secrets[31] of a client,[32] except in special circumstances.[33]

Canon 5 addresses conflicts of interest, and mandates that "A Lawyer Should Exercise Independent Professional Judg-

24. *See* notes 42-53 *infra* and accompanying text.
25. *See* notes 54-73 *infra* and accompanying text.
26. *See* notes 74-103 *infra* and accompanying text.
27. *See* notes 104-29 *infra* and accompanying text.
28. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4.
29. *See* Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 607 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978). "It is readily apparent that if an attorney is permitted to reveal confidences 'the free flow of information from client to attorney, so vital to our system of justice, will be irreparably damaged.'" Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir. 1972) (quoting United States v. Standard Oil Co., 136 F. Supp. 345, 355 (S.D.N.Y. 1955)).
30. *See* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570 (2d Cir. 1973); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir. 1972). EC 4-1 provides:

> A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.

31. DR 4-101(A) defines "confidences" and "secrets" as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

32. DR 4-101(B) provides:

ment on Behalf of a Client."[34] An attorney thereby owes the client a duty of undivided loyalty[35] which neither "personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute."[36] Because a conflict could undermine the vigor of an attorney's representation of a client,[37] the Disciplinary Rules under Canon 5 require an attorney to refuse employment that would create a conflict of interest.[38] These Rules also prohibit a lawyer from acquiring an

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Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
(1) Reveal a confidence or secret of his client.
(2) Use a confidence or secret of his client to the disadvantage of the client.
(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

DR 4-101(D) goes on to caution: "A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."

33. *See* DR 4-101(C).

34. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 5.

35. *See* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976); Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, 474 F. Supp. 223, 225 (S.D.N.Y. 1979). "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." EC 5-1.

36. EC 5-1.

37. "A lawyer should not be permitted to put himself in a position where even unconsciously he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another." Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 99 (S.D.N.Y. 1972). *See* Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608-09 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386-87 (2d Cir. 1976); Sapienza v. New York News, Inc., 481 F. Supp. 676, 679 (S.D.N.Y. 1979); United States v. RMI Co., 467 F. Supp. 915, 919, 922 (W.D. Pa. 1979).

38. DR 5-101(A) provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." *See also* EC 5-2. Further, DR 5-105(A) and (B) provide that a lawyer shall refuse proffered employment or multiple employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment" or by the representation of another client, or "if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." The Code defines "differing interest" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." ABA CODE OF PROFESSIONAL RESPONSIBILITY, at *Definitions*. *See also* EC 5-14 and 5-15.

DR 5-105(C) allows a lawyer to represent multiple clients in situations covered by DR 5-105(A) and (B) "if it is obvious that he can adequately represent

interest in the litigation he or she is conducting for a client;[39] require an attorney to refuse employment or withdraw as counsel if the lawyer or a member of the lawyer's firm ought to appear as a witness for a client;[40] and generally mandate that if an attorney is disqualified under a Disciplinary Rule, no lawyer associated with that attorney or attorney's firm may act as counsel in the same suit.[41]

### A. Concurrent Representation of Adverse Interests

A conflict arises when an attorney, or different attorneys in the same firm, concurrently represent parties with adverse interests.[42] Such a situation raises two basic ethical concerns: that the divided loyalty of the attorney or attorneys will dilute the vigor of the representation of either client,[43] and that the attorney will use confidences of one client to benefit the

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the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

39. *See* DR 5-103(A)-(B).

40. *See* DR 5-101(B); DR 5-102(A).

41. *See* DR 5-105(D). Vicarious disqualification is deemed necessary: "The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking." ABA Comm. on Professional Ethics, Formal Opinion No. 33 (1931), *quoted in* American Bar Foundation, Annotated Code of Professional Responsibility 246 (1979). The purpose of DR 5-105(D) is "to prevent circumvention of the rules of the Canon through the actions of partners, associates, or affiliates." *Id.* at 246-47. *See also* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 233 (2d Cir. 1977).

42. *See, e.g.*, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977) (Andersen's regional counsel accepted a retainer from Fund of Funds, allegedly "with the knowledge that Andersen might be implicated in securities actions brought on behalf of the Fund"); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1385 (2d Cir. 1976) (attorney was a partner in both a New York City law firm and a Buffalo firm; his New York City firm was representing the plaintiff in the instant lawsuit while his Buffalo firm was concurrently representing the defendant in other, similar litigation); Estep v. Johnson, 383 F. Supp. 1323, 1324-25 (D. Conn. 1974) (staff attorney of a legal assistance association had previously represented plaintiff in a landlord-tenant dispute intimately related to defendant's present damage action; defendants in the present action were represented by an attorney who was on the board of directors of the legal assistance association).

43. [C]onsiderations of public policy, no less than the client's interests, require rigid enforcement of the rule against dual representation where one client is likely to be adversely affected by the lawyer's representation of another client and where it appears he cannot exercise independent judgment and vigorous advocacy on behalf of the one without injurying the interests of the other.

Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 99 (S.D.N.Y. 1972). *See also* IBM Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386-87 (2d Cir. 1976).

other.[44] Although Canons 4 and 5 focus on precisely these ethical concerns,[45] some courts have relied in part on Canon 9 in such cases.[46] Perhaps the most striking illustration is *Board of Education v. Nyquist*.[47] In *Nyquist*, male teachers faced a suit by female teachers. Both males and females belonged to the same teachers' association; counsel for the males was also the salaried general counsel for the association. The lawyer for the females moved to disqualify the lawyer for the males on Canon 9 grounds and the trial court granted the motion even though it found no violation of Canons 4 or 5.[48] The Second Circuit reversed, conceding there was "some possibility" of an "appearance of impropriety"[49] but held that "when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."[50] Judge Mansfield filed a concurring opinion to emphasize his view that there was not even the appearance of impropriety in the lawyer's conduct.[51]

Thus, resort to the vagueness of Canon 9 is altogether unnecessary when Canons 4 and 5 directly apply. Several courts have decided "concurrent adverse representation" cases on the bases of Canons 4 and 5 without relying on Canon 9.[52] Moreover, the drafters of Canon 9 did not intend for the Canon to be applied when any of the first eight Canons are controlling.[53] The inappropriateness of Canon 9 in this context is demon-

44. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir. 1978); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235-36 (2d Cir. 1977).

45. *See* notes 28-41 *supra* and accompanying text.

46. *See, e.g.*, IBM Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386-87 (2d Cir. 1976).

47. 590 F.2d 1241 (2d Cir. 1979).

48. *Id.* at 1243.

49. *Id.* at 1247.

50. *Id.*

51. *Id.* at 1248. Judge Mansfield stated: "I would reverse the district court's decision on the ground that there is no 'appearance of impropriety' in the representation by an association-salaried lawyer . . . of one set of dues-paying members pursuant to its legal services program in a case involving other dues-paying members with conflicting interests." *Id.*

52. *See, e.g.*, Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979); IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978); Estates Theatres, Inc. v. Columbia Picture Indus., Inc., 345 F. Supp. 93 (S.D.N.Y. 1972).

53. John F. Sutton, Jr., reporter for the committee that drafted the 1969 version of the Code, noted "that the committee intended for the last Canon to provide the lawyer with guidance about what to do in situations not discussed in the first eight Canons," and emphasized that "the lawyer's duty to avoid the appearance of professional impropriety was of a much lower order than the duties specified in the other provisions of the Code." AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 398 (1979) (based on Interview

strated by the refusal of any court—so far as has been discovered—to base its decision exclusively on Canon 9 in a concurrent adverse representation case.

### B. Class Counsel Related to Named Class Plaintiff

Canon 9 has also been applied when an attorney who serves as counsel to the plaintiffs in a class action is related in some way to a plaintiff class representative.[54] In these circumstances the roles of class representative and class counsel may converge, so that either the class attorney actually is a class plaintiff or the attorney assumes the position of a "quasi-plaintiff."[55] The primary ethical concern here is that the potential for recovery of large attorneys' fees might dampen the lawyer's zeal in seeking the most favorable settlement for the class.[56] The potential conflict is one between the pecuniary interest of the class attorney in maximizing his or her fee award, and the

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with John F. Sutton, Jr., by Olavi Marcu, in Houston (Dec. 20, 1976) (on file at American Bar Foundation, Chicago)). Sutton stated:

> If a lawyer has a duty to a court, or to a client or to someone else, the lawyer ought to take action to meet that duty even if his conduct will be misunderstood. Only where there's no real guidance and no other interest to be served should a lawyer act on the possibility of appearance. If there's no other guidance anywhere in the Code, then the lawyer looks to Canon 9 and does what makes the professional look best; however, the lawyer should not let Canon 9 stand in his way in doing what's proper under other canons and DR's.

*Id.* at 398-99 (quoting Transcript of Interview with John F. Sutton, Jr., *supra*).

54. *See, e.g.*, Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978) (one named plaintiff was the wife of a partner in the firm that sought to represent the class of plaintiffs, and another named plaintiff was himself a partner in that firm); Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090 (3d Cir.) (class counsel was a law partner of the named class representative), *cert. denied*, 429 U.S. 830 (1976); *cf.* Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973) (class action certification under Fed. R. Civ. P. 23(a) denied because plaintiffs assumed dual roles of attorneys for and representatives of the proposed class).

55. *See* Comment, *The Attorney as Plaintiff and Quasi-Plaintiff in Class and Derivative Actions: Ethical and Procedural Considerations*, 18 B.C. Indus. & Com. L. Rev. 467, 477 (1977). This merging of roles is obvious when the class representative and the class attorney are the same person. *See, e.g.*, Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 13-14 (D.D.C. 1973). Even where the relationship is created by membership in the same law firm or by family ties, the identity of pecuniary interest is so strong that one must inevitably conclude that the roles of class representative and class counsel are being filled by the same "person." *See* Susman v. Lincoln Am. Corp., 561 F.2d 86, 94-95 (7th Cir. 1977); Turoff v. May Co., 531 F.2d 1357, 1360 (6th Cir. 1976).

56. *See, e.g.*, Turoff v. May Co., 531 F.2d 1357, 1360 (6th Cir. 1976); Bachman v. Pertschuk, 437 F. Supp. 973, 977 (D.D.C. 1977); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7, 14 (D.D.C. 1973). *See also* Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1585 n.29 (1976); Comment, *supra* note 55, at 473-79.

pecuniary interest of the plaintiff class as a whole in obtaining the largest possible settlement.

It is arguable whether this situation presents any impropriety at all—attorneys' conduct of litigation and pursuit of settlements often have a direct bearing on the related level of fees. Indeed, in these "class action conflicts," the Third Circuit contends it is "the *appearance*, not the *fact*, of impropriety" that is at issue.[57] That Circuit has adopted a per se rule, grounded on Canon 9, which provides:

> [N]o member of the bar either maintaining an employment relationship, including a partnership or professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23(b)(3) class action may serve as counsel to the class if the action might result in the creation of a fund from which an attorneys' fee award would be appropriate.[58]

This remarkable rule was adopted in *Kramer v. Scientific Control Corp.*[59] In that case, Kramer was a lawyer who was designated as plaintiff class representative; counsel for the class was a former associate of Kramer who at the time of suit was Kramer's law partner. The court's concern was with appearances:

> [W]e cannot agree that an appearance of an improper conflict of interest inherent in one partner's dual role as class representative and as class counsel vanishes when his partner [or attorney employee or office associate] is substituted as class counsel. To argue as appellees do is to argue against reality, against the vagaries of human nature, and against widely-held public impressions of the legal profession.[60]

The circuit court apparently had reservations about the ability of district judges to supervise the conduct of class actions, including the award of attorneys' fees.[61] Indeed, the district court had held that defendants' objections should be raised when it came time to award fees, rather than on a motion to disqualify.[62] Although the *Kramer* rule has the advantage of being clear and definite, it was adopted without either notice to or an opportunity for comment by the Bar or interested members of the public—procedures that are widely recognized as fundamental to fairness in rulemaking.[63]

57. Kramer v. Scientific Control Corp., 534 F.2d 1085, 1091 (3d Cir.) (emphasis in original), *cert. denied*, 429 U.S. 830 (1976).

58. *Id.* at 1093.

59. 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

60. *Id.* at 1092.

61. Rule 23 of the Federal Rules of Civil Procedure grants district judges the power to supervise class actions before them. FED. R. CIV. P. 23.

62. Kramer v. Scientific Control Corp., 64 F.R.D. 558, 559 (E.D. Pa. 1974), *rev'd*, 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976).

63. Section 553 of the Administrative Procedure Act, which establishes procedures for rulemaking by federal agencies, requires notice of a proposed

Unfortunately, the vagueness of Canon 9 seems to invite such a rulemaking approach.

Breaking from its earlier position of judicial restraint in connection with Canon 9, the Fifth Circuit has expressly adopted the *Kramer* rule for disqualification in the class action context.[64] Earlier, in *Woods v. Covington County Bank*,[65] the Fifth Circuit had in effect "rejected all *per se* rules in applying Canon 9,"[66] establishing instead a two-step analysis for Canon 9 cases. The *Woods* court held that "there must be at least a reasonable possibility that some *specifically identifiable impropriety did in fact occur*,"[67] and that a court "must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case."[68]

Unlike the Third Circuit, the Fifth Circuit did not rest on appearances alone when adopting the per se rule of *Kramer*.[69] Instead, it found that an actual conflict is inherent when an attorney is a class member or closely related to a member and also serves as class counsel.[70] This finding indicates, however,

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rulemaking to be published in the Federal Register, 5 U.S.C. § 553(b) (1976), as well as an opportunity for comment by interested persons, 5 U.S.C. § 553(c) (1976). *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1330-36 (1972). *Cf.* Armstrong v. McAlpin, 625 F.2d 433, 442-43 (2d Cir. 1980) (en banc) (before ruling on the disqualification of a former government attorney, court examined the opinions of the ABA and the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, as well as briefs from the United States, the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Maritime Commission, the Commodities Futures Trading Commission, and twenty-six former government lawyers).

64. *See* Zylstra v. Safeway Stores, Inc., 578 F.2d 102 (5th Cir. 1978). The court held:

> We are persuaded by the analysis of the Third Circuit that attorneys who are partners or spouses of named plaintiffs, or who themselves are members of the class of plaintiffs should be subject to a per se rule of disqualification under Canon 9 and should not be permitted to serve as counsel for the class.

*Id.* at 104.

65. 537 F.2d 804 (5th Cir. 1978). In *Woods*, a private attorney, Nichols, while a Naval Reserve officer on active duty, conducted an investigation of a securities fraud perpetrated against returning prisoners of war (POWs). The investigation was ordered by the Navy's Office of the Judge Advocate General. After Nichols returned to his private practice, the Navy referred the POWs to him. Nichols accepted the case.

66. *Id.* at 812. *See also* Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 103 (5th Cir. 1978).

67. 537 F.2d at 813 (emphasis added).

68. *Id.* at 813 n.12.

69. *See* text accompanying note 57 *supra*.

70. Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978).

why Canon 9 is not needed to resolve the ethical issues in this setting. If the relationship between a class representative and the class counsel creates inherent conflict, Canon 5 provides an adequate foundation for proscribing the conflict. Indeed, courts have relied on DR 5-103(A), which directs that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client,"[71] to deny class action status in suits in which the attorney for the class was also a named plaintiff.[72] It would not be difficult to extend that rule to a case in which the attorney for the class is deemed a surrogate plaintiff. If, on the other hand, no actual conflict is created in this situation, then appearances alone would seem an insufficient basis upon which to disqualify.[73] Thus, whether this situation presents an "actual conflict" or an "appearances" problem, Canon 9 is either unnecessary or inadequate as a basis for resolving the issues.

### C. Prior Representation of an Adverse Party

A category of more commonly alleged Canon 9 violations involves situations where a lawyer, or associate of that lawyer, previously represented a party who is the adversary of his present client.[74] It is presumed that some confidential information was disclosed to the attorney during the former period of representation,[75] and the concern is that such confidences may be disclosed or otherwise used by the attorney to benefit his

71. DR 5-103(A).

72. *See, e.g.*, Bachman v. Pertschuk, 437 F. Supp. 973, 976-77 (D.D.C. 1977).

73. *See, e.g.*, Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979); Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1978).

74. *See, e.g.*, Arkansas v. Dean Foods Prods. Co., 605 F.2d 380, 382 (8th Cir. 1979), *discussed in* notes 81-86 *infra* and accompanying text; Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 170-71 (5th Cir. 1979) (attorney representing corporate defendants in trademark infringement action had previously represented both corporate plaintiff and corporate defendants when the corporations were owned by members of the same family); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1312-16 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), *discussed in* notes 87-92 *infra* and accompanying text; Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 564, 571 (2d Cir. 1973) (plaintiff's counsel in action seeking declaratory judgment that patents held by defendant were invalid had previously represented part owners of corporate defendant in patent litigation involving a claim that defendant's part owner controlled defendant and used that control for an illegal purpose).

75. "The attorney-client relationship raises an irrefutable presumption that confidences were disclosed." Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978). *See also* Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 171 (5th Cir. 1979); Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 710 (7th Cir. 1976); NCK Organization Ltd. v. Bregman, 542 F.2d 128, 134 (2d Cir. 1976).

present client.[76]

Although Canon 4 is invariably a key standard in this type of case, some courts have seized on the more vague exhortations of Canon 9 as well. Perhaps the most sweeping view of Canon 9's scope in this context was adopted by the Eighth Circuit in *Fred Weber, Inc. v. Shell Oil Co.*[77] As a threshold matter, the *Weber* court noted:

> That no unethical or untoward act may have occurred is implicit in the canon's emphasis on "appearance." The conduct under scrutiny must therefore be evaluated in an "eye of the beholder" context, and the lawyer must be disqualified when an actual appearance of evil exists, though there be no proof of actual evil.[78]

Based on a hypothetical poll of "members of the public" regarding their opinions on "impropriety," the court found that "mere representation of C against B by a lawyer who had represented B's codefendant in a related prior suit" would not make members of the public think that the lawyer was acting improperly.[79] The court reasoned that, because "the public [is] aware that particular lawyers have specialized in certain areas of the law and that their number is limited within specific geographical limits," such patterns of representation would not be perceived as improper.[80]

This reliance on what the public might think, rather than on the actual risk that a confidence may be abused, surfaced

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76. "Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation." Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973). *See also* Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). The ethical violation in such circumstances grows out of the Code's directive that "[t]he obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." EC 4-6. The test used by most courts to determine whether disqualification is necessary is the "substantial relationship" test formulated in T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953):

> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

77. 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978).

78. *Id.* at 609.

79. *Id.*

80. *Id.*

again in *Arkansas v. Dean Foods Products Co.*[81] In *Dean Foods*, the head of the antitrust division of the State of Arkansas, Mr. Griffin, had represented Dean Foods while in private practice in bankruptcy proceedings involving one of its distributors. The distributor threatened an antitrust action for price-fixing and Dean Foods decided to drop its claim in bankruptcy. The antitrust division brought suit against Dean Foods for price-fixing and Dean Foods moved to disqualify Griffin and his staff from participation. The trial court concluded that Griffin knew nothing about Dean's antitrust problems and denied the motion.[82] The Eighth Circuit, however, was not content to rest its decision on Canon 4's disciplinary rules. Instead, it again appeared to conduct a hypothetical poll to determine non-lawyer attitudes:

> [C]onsiderations of actual impropriety are irrelevant to applications of Canon 9. Hence, Griffin's ignorance of Dean's secrets, and a resulting absence of potential for their actual use against Dean, must be presumed before Canon 9 comes into play. The public cannot be expected to know of Griffin's actual knowledge. It deals in images and appearances. Though a lawyer cannot be expected to be 'Holier than the Pope,' his conduct must be such as to breed at least the confidence formally reposed in the parish priest.[83]

Thus, Griffin was disqualified from seeking to vindicate the state's interest in punishing or recovering damages from price fixers.[84] Although the court declined to disqualify Griffin's staff under Canon 4, it held that such wholesale disqualification was mandatory under Canon 9.[85] Manifesting the highest degree of judicial clairvoyance, the court found:

> [A] member of the public or of the bar would see an impropriety in the continued representation of the [state] against [Dean Foods] by staff lawyers whose supervisor had been disqualified because his former

81. 605 F.2d 380 (8th Cir. 1979).

82. *Id.* at 382. Even though the appeals court tacitly adopted a trial court finding that Griffin had not reviewed and had no knowledge of the distributor's file, it concluded that "confidences imparted to an attorney are shared among his partners and employees associated with him." *Id.* at 385 (citing Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 608 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978)).

83. 605 F.2d at 386 (footnote omitted).

84. *Id.* at 386.

85. *Id.* at 386-87. The Eighth Circuit did permit the two outside firms retained by the State of Arkansas as special antitrust counsel to continue the suit. The court said:

> The normal public and professional perception of co-counsel envisions two or more attorneys or firms working together . . . while continuing to retain their individual identities and institutional independence. The same appearance of impropriety present [in the case of Griffin and his staff] is not present in the mere act of a disqualified lawyer's co-counsel continuing in the case . . . .

*Id.* at 388.

> firm represented [Dean Foods] in a related suit. The public perceives, a client has the right to expect, and the goals of the Code require us to assume, that the members and staff of a law firm working on a suit do so collectively rather than individually. It is to be expected, therefore, that a lawyer having earlier received confidential information could at least inadvertently direct his staff to proceed along lines dictated or influenced by that information.[86]

Although relying less on how the public may perceive a given pattern of representation, the Seventh Circuit has also taken a broad view of the scope of Canon 9. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[87] the Washington office of a large Chicago-based law firm had represented a trade association of oil companies (but not the companies directly) in gathering and evaluating information in preparation for lobbying against certain legislation.[88] Later, the Chicago office represented Westinghouse in an antitrust suit against various corporations, some of whom were members of the trade association. These defendants moved to disqualify the law firm, alleging that the trade association's member oil companies had furnished the Washington office of the firm confidential information that was relevant to the antitrust suit. The district court denied the motion on the ground that there could be no conflict problem, at least under Canons 4 and 5, unless there had been an attorney-client relationship between the law firm and the oil company defendants.[89] The trial court did find, however, "some evidence of a Canon 9 violation, even without proof of a formal attorney-client relationship."[90] The district court refused "to take the extreme step of disqualification to remedy a Canon 9 violation by itself," reasoning that:

> Canon 9, unlike Canons 1-8, is primarily aspirational in character. Its language is all-inclusive, perfectionist, and unmerciful. But at the same time, its command is less comprehensively supported by the disciplinary rules which the bar has drafted to implement and give teeth to the Canons. While courts have disqualified attorneys under the appearance of impropriety doctrine even without evidence of actual

86. *Id.* at 387 (footnotes omitted).

87. 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). This case could also be discussed as an illustration of the "concurrent representation" problem, *see* text accompanying notes 42-53 *supra*, since the sequence of events allows inclusion in either category.

88. 580 F.2d at 1313. The proposals—introduced in Congress in October, 1975—would have broken up the oil companies, "both vertically by separating their control over production, transportation, refining and marketing entities, and horizontally by prohibiting cross-ownership of alternative energy resources in addition to oil and gas." *Id.*

89. Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284, 1303 (N.D. Ill.), *rev'd sub nom.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

90. 448 F. Supp. at 1303-04.

> wrongdoing, their decisions have typically rested on one of these disciplinary rules.[91]

On appeal the Seventh Circuit reversed, citing Canon 9 in a peculiarly cryptic manner:

> Gulf, Kerr-McGee and Getty each entertained a reasonable belief that it was submitting confidential information regarding its involvement in the uranium industry to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company. Canons 4 and 5, as well as Canon 9, apply.[92]

In a second *Westinghouse* case[93] involving allegations of a similar conflict of interest, the Seventh Circuit again utilized Canon 9 to disqualify an attorney. Instead of relying on Canon 4's disciplinary rules alone, the panel stated:

> Canon 4 provides that "a lawyer should preserve the confidences and secrets of a client," and Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety." As a result it is clear that the determination of whether there is a substantial relationship [between the two representations] turns on the *possibility, or appearance thereof*, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought.[94]

These cases illustrate how most courts that have dealt with "prior representation" issues have based their decision on both Canons 4 and 9.[95] Such courts have found a Canon 9 appearance of impropriety even when it was assumed that no relevant confidential information had been acquired as a result of the prior representation.[96] Thus, even the mere appearance of a breach of confidentiality may necessitate disqualification of the attorney.[97]

Yet application of this "appearances" standard to prior representation cases seems contrary to the intent of the drafters of the Code.[98] Such cases generally can be decided solely under

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91. *Id.* at 1304.

92. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d at 1321.

93. Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978).

94. *Id.* at 224.

95. *See, e.g.*, Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709-13 (7th Cir. 1976); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-75 (2d Cir. 1973).

96. *See* Arkansas v. Dean Foods Prods. Co., 605 F.2d 380, 385 (8th Cir. 1979); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973).

97. *See* Arkansas v. Dean Foods Prods. Co., 605 F.2d 380, 385 (8th Cir. 1979); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 (7th Cir. 1978); Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (7th Cir. 1976); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973).

98. *See* note 53 *supra* and accompanying text. Since the concerns and interests inherent in prior representation cases are specifically addressed by Canon 4, Canon 9 should not be used lightly to proscribe otherwise permissible conduct. This view is espoused by a commentator who finds no justification in the provisions of the Code for an application of the language of Canon 9 to situations not mentioned in its own Disciplinary Rules. Note, *The Second Circuit*

the ethical standards of Canon 4, utilizing a more factually oriented approach to determine whether the prior representation might lead to use of confidential information relevant to the present matter.[99] The Second Circuit has sometimes relied on such a factual inquiry to deny disqualification motions, acknowledging that Canon 9 "is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder."[100] Other courts have similarly refused to apply the "appearances" standard of Canon 9 after an inference of Canon 4 impropriety was rebutted by a factual analysis.[101] Such an approach is clearly more proper in prior representation cases where the problem is ultimately one of actual conflicts, not mere appearances.[102] As the Second Circuit has recognized, "Canon 9 . . . should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."[103]

### D. Prior Involvement as a Public Employee in a Related Matter

The final category of Canon 9 conflicts arises when a lawyer on one side of a case, or a partner or associate of that lawyer, was previously involved in a related case as a public em-

*and Attorney Disqualification*—Silver Chrysler *Steers in a New Direction*, 44 Fordham L. Rev. 130, 142-45 (1975).

99. *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975). In *Silver Chrysler*, Chrysler's counsel moved to disqualify the law firm representing Silver Chrysler on the ground that a partner of that firm had previously been employed as an associate of the firm representing Chrysler and while there had worked on certain Chrysler matters. *Id.* at 752. The court recognized that the reality of law practice in large firms necessitated the conclusion that an associate's relationship with clients could not be considered "representation" such that the confidential information possessed by partners in the firm could readily be imputed to him. *Id.* at 756-57. The court acknowledged the importance of not unnecessarily curbing the careers of lawyers who began their practices in large firms, and concluded that there was no appearance of impropriety in denying the motion to disqualify. *Id.* at 757.

100. *Id.* at 757.

101. *See* Gas-a-tron of Arizona v. Union Oil Co., 534 F.2d 1322, 1324-25 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); Schmidt v. Pine Lawn Memorial Park, Inc., 198 N.W.2d 496, 502-03 (S.D. 1972). *See also* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1195-96 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974), in which the court held that the language of DR 4-101(C)(4), which states that the attorney may disclose confidential information in self-defense, was not invalidated by the language of Canon 9 despite the alleged "aura of complicity" that existed between the attorney accused of revealing confidential matters and the opposing party.

102. *See* Note, *supra* note 98, at 150-52.

103. International Elec. Corp. v. Flanzer, 527 F.2d 1288, 1295 (1975).

ployee.[104] Disciplinary Rule 9-101(B) prohibits a lawyer from accepting "private employment in a matter in which he had substantial responsibility while he was a public employee."[105] The purpose of this rule is to avoid "the manifest possibility that [a former government lawyer's] action as a public legal official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or to upset what he had done."[106]

Because DR 9-101(B) directly addresses the issue of private representation by former government attorneys, many of the cases in which the issue arises have been decided exclusively under Canon 9.[107] For example, in *General Motors Corp. v. City of New York*,[108] an attorney who had had substantial responsibility for an antitrust case against General Motors while working for the federal government had subsequently left the government and joined a New York City law firm. The City of New York retained the attorney to bring a treble damage antitrust case against General Motors (GM); both antitrust actions involved the sale of buses. GM moved to disqualify the lawyer because of a breach of DR 9-101(B), alleging that the private ac-

104. *See, e.g.*, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), *discussed in* notes 113-21 *infra* and accompanying text; United States v. Miller, 624 F.2d 1198 (3rd Cir. 1980) (a partner in the law firm hired to represent Miller on charges of tax evasion and signing false income tax returns had previously been an assistant U.S. attorney while the case against Miller was being prepared by the government); Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976), *discussed in* notes 65-68 *supra* and accompanying text; General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974), *discussed in* notes 108-112 *infra* and accompanying text.

105. DR 9-101(B).

106. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 37 (1931), *quoted in* Woods v. Covington County Bank, 537 F.2d 804, 814 (5th Cir. 1976); General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974); International Union, United Auto. Aerospace & Agricultural Implement Workers v. National Caucus of Labor Comms., 466 F. Supp. 564, 571 (S.D.N.Y.), *aff'd*, 607 F.2d 996 (2d Cir. 1979).

107. *See, e.g.*, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc) (involving a former SEC employee); United States v. Miller, 624 F.2d 1198 (3d Cir. 1980) (involving a former assistant U.S. Attorney); *In re* Grand Jury Subpoenas, 573 F.2d 936 (6th Cir.), *appeal dismissed on other grounds*, 584 F.2d 1366 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1277 (1979) (involving a former IRS attorney); Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) (involving a private attorney serving in Navy Reserve); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) (involving a former Justice Department attorney); International Union, United Auto. Aerospace & Agricultural Implement Workers v. National Caucus of Labor Comms., 466 F. Supp. 564 (S.D.N.Y.), *aff'd*, 607 F.2d 996 (2d Cir. 1979) (involving former Justice Department attorneys); Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975) (involving a former state deputy attorney general).

108. 501 F.2d 639 (2d Cir. 1974).

tion was the same "matter" as the government's antitrust suit against GM.[109] The Second Circuit held that it was the same matter.[110] Chief Judge Kaufman's opinion, however, did not rely on the Disciplinary Rule alone. Instead, it presented a brief but eloquent treatise on "Canon 9's 'appearance-of-evil' doctrine,"[111] concluding that both Canon 9 and one of its disciplinary rules had been violated.[112]

The Second Circuit has recently taken a more restricted view of such an "appearances alone" doctrine. In *Armstrong v. McAlpin*,[113] a former government attorney, who was clearly excluded under DR 9-101(B) from working on a private matter, was "screened" from his firm's handling of the matter pursuant to an ABA-sanctioned procedure designed to avoid disqualification of an entire firm when the "tainted" lawyer is precluded from all involvement with the case.[114] The trial court found that the law firm had complied with the letter and spirit of the ABA procedural rules and had effectively screened the lawyer, and that there was "no impropriety and no appearance of impropriety under all circumstances."[115] A three-judge panel of the Second Circuit, however, disqualified the entire firm, but expressly refused "to formulate a rule of general application."[116] After a rehearing en banc, the full circuit reinstated the trial court's denial of the motion to disqualify.[117] Without deciding whether "screening" is adequate to resolve the ethical issues involved, the full circuit stated that when there is "uncertainty over what is 'ethical,'" there is "wisdom . . . [in] adopting a restrained approach that focuses primarily on pre-

109. *Id.* at 649. The court noted that it also had to determine whether the attorney's employment with the City of New York was "private employment," but summarily disposed of the issue. *Id.* at 650.

110. *Id.* at 650.

111. *Id.* at 649. Chief Judge Kaufman stated:

> [T]he "public's trust" is the raison d'être for Canon 9's "appearance-of-evil" doctrine. Now explicitly incorporated in the profession's ethical Code, this doctrine is directed at maintaining, in the public mind, a high regard for the legal profession. The standard it sets—i.e. what creates an appearance of evil—is largely a question of current ethical-legal mores.

Id. (footnote omitted).

112. *Id.* at 650-51.

113. 625 F.2d 433 (2d Cir. 1980) (en banc).

114. *See* ABA COMM. ON ETHICS & PROFESSIONAL RESPONSIBILITY, Formal Opinion 342 (1975), *reprinted in* 62 A.B.A.J. 517, 521 (1976); COMMITTEE ON PROFESSIONAL & JUDICIAL ETHICS OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK, Opinion No. 889, 3 RECORD 552, 566-67 (1976).

115. Armstrong v. McAlpin, 461 F. Supp. 622, 625 (S.D.N.Y. 1978).

116. Armstrong v. McAlpin, 606 F.2d 28, 33 (2d Cir. 1979).

117. Armstrong v. McAlpin, 625 F.2d 443, 446 (2d Cir. 1980) (en banc).

serving the integrity of the trial process."[118] Finding no actual "threat of taint" to the trial,[119] the court noted that only the possible appearance of impropriety could support disqualification.[120] It found that there was no such appearance and that appearances alone would be inadequate to disqualify except in "unusual situations."[121]

The Second Circuit's shift away from an "appearances alone" doctrine is significant. In conflict of interest situations the issue usually to be addressed is whether an actual conflict or breach of confidentiality will likely occur in violation of Canons 4 or 5. There is widespread concern that either former government lawyers will unfairly utilize information obtained in the course of their prior employment[122] or, in anticipation of future private employment, they will be over-zealous or under-zealous in conducting their governmental duties.[123] The Code of Professional Responsibility deals with this situation separately in DR 9-101(B).[124] Application of its per se rule can be harsh in some cases, but it does not require judges to consider "appearances" and its commands are as clear as those found in most rules and statutes.

Before concluding this analysis of Canon 9 in the federal courts, one additional case warrants attention because it is an

118. *Id.* at 444.

119. *Id.* at 445.

120. *Id.* at 446.

121. *Id.* Although the court's en banc decision in *McAlpin* demonstrates admirable restraint, its reasoning calls for even further restraint respecting Canon 9. If disqualification is to be avoided where the ethical issue is one about which reasonable minds are uncertain, *see* note 118 *supra* and accompanying text, then it could almost never be used where appearances alone may be allegedly improper and no impropriety in fact has occurred.

122. *See* notes 28-33 *supra* and accompanying text. *See, e.g.*, United States v. Miller, 624 F.2d 1198 (3d Cir. 1980); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); International Union, United Auto. Aerospace & Agricultural Implement Workers v. National Caucus of Labor Comms., 466 F. Supp. 564 (S.D.N.Y.), *aff'd*, 607 F.2d 996 (2d Cir. 1979); Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973).

123. "A rule of law permitting government attorneys to seek employment after retirement dealing with the identical subject matter would permit the argument that while in the public employ they investigated and prosecuted only those matters conducive to successful civil employment later." Allied Realty of St. Paul v. Exchange Nat'l Bank of Chicago, 283 F. Supp. 464, 469 (D. Minn. 1968), *aff'd*, 408 F.2d 1099 (8th Cir.), *cert. denied*, 396 U.S. 823 (1969). *See also* United States v. Ostrer, 597 F.2d 337, 340 (2d Cir. 1979); Handleman v. Weiss, 368 F. Supp. 258, 264 (S.D.N.Y. 1973); Note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. UNIV. L. REV. 343, 356-57 (1976).

124. *See* text accompanying notes 104-07 *supra*. There are, in addition to the Code of Professional Responsibility, federal statutes absolutely barring certain government lawyers from representing private clients in matters pending before government agencies. *See, e.g.*, 18 U.S.C. § 207 (1976).

important illustration of how the vagueness of Canon 9 tempts courts to apply it in an unpredictable and sometimes bizarre manner. *In re Grand Jury Subpoenas*[125] involved a federal grand jury investigation of certain tax returns by General Motors. An Internal Revenue Service (IRS) attorney who had participated in the initial audit and who had recommended the grand jury investigation of possible criminal fraud was thereafter authorized by the Attorney General to act as special counsel to assist in the grand jury proceedings. A Sixth Circuit panel disqualified the IRS lawyer as special counsel, claiming there was an "appearance of a conflict of interest."[126] The decision prompted a sharp dissent by Judge Merritt:

> In this case the lawyer has not accepted new employment that either creates a conflict of interest or creates the appearance of a conflict of interest. There is no conflict of interest between the Department of Justice and the Internal Revenue Service. If the lawyer had left General Motors to participate in the grand jury proceedings, General Motors would be entitled to have the lawyer disqualified on grounds of conflict of interest. In tax cases, however, the investigative arm of the government, the IRS, and the litigative arm, the Department of Justice, must exchange information; and they may also exchange the people in the departments who have the information.[127]

Following an en banc rehearing, the disqualification motion was dismissed for lack of appellate jurisdiction,[128] effectively permitting the IRS lawyer to be reinstated as special counsel. Nonetheless, the case demonstrates the risk of careless, haphazard disqualifications that is inherent in the command of Canon 9 to "avoid even the appearance of impropriety."[129]

## IV. CONCLUSION

Canon 9 of the ABA Code has developed into a source of unpredictable, post hoc rulemaking regarding the standards of professional conduct. As the foregoing discussion demonstrates, many courts are willing to disqualify counsel on the basis of appearances alone, absent evidence of actual impropriety and sometimes despite proof that no actual impropriety occurred. Disqualification of a lawyer imposes a serious taint. In Canon 9 cases the decision often turns on how different judges suppose that the public might view a given ethical issue. Too much can be made of such public perceptions, even when cor-

125. 573 F.2d 936 (6th Cir.), *appeal dismissed on other grounds*, 584 F.2d 1366 (6th Cir. 1978) (en banc), *cert. denied*, 99 S. Ct. 1277 (1979).
126. *Id.* at 942.
127. *Id.* at 947.
128. 584 F.2d 1366, 1371 (6th Cir. 1978) (en banc).
129. *See* text accompanying note 10 *supra*.

rectly intuited by courts. What lay persons sometimes perceive as impropriety is frequently in the highest tradition of the bar: for example, representing unpopular clients, defending the guilty, and being courteous to opposing counsel during the course of a trial.

The future of Canon 9 is uncertain. An ABA commission has released a working draft of a new set of "Rules of Professional Conduct"[130] which jettisons the whole concept of "appearance of impropriety,"[131] terming it "question-begging" and a concept resting on "subjective judgment."[132] This proposal is subject to change, of course, by the Commission itself and by the ABA as a whole. Even if the draft proposal proceeds intact, the state-by-state adoption process could result in perpetuation of the "appearance" standard. Finally, federal courts might continue to apply such a standard by relying on the rulings noted throughout this article.

"Appearance of impropriety" is simply too dangerous and vague a standard to serve as a foundation for guiding professional conduct. It should be dropped from the Model Code, from state-level rules of conduct, and from federal decision-making in cases involving the conduct of lawyers appearing in federal courts.

130. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (discussion draft 1980).

131. *Id.* at 147. The American Trial Lawyers Foundation (ATLF) recently published a discussion draft of its "Code of Conduct" which also abolishes the appearance of impropriety standard. ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER'S CODE OF CONDUCT 804-05 (public discussion draft 1980). This draft noted the problems of vagueness inherent in Canon 9:

> Except for a few specific proscriptions, however (such as commingling funds), the canon is given no content. What is an impropriety? To whom must there appear to be one? To what degree of certainty? On what facts? (Also, since a conflict of interest under the [Code of Professional Responsibility] depends in part upon appearances, a lawyer could be disciplined for the doubly vague offense of apparently being guilty of what appears to be an impropriety.)

*Id.* at 804. The ATLF Commission found that any Canon 9-type rule would be "too vague to be an acceptable basis for disciplinary action," *id.* at 805, even after the Commission's Reporter had attempted to draft the Rule so as to be very specific. *Id.* at 804-05. Instead, the Commission drafted rules "proscribing particular conduct that gives rise to reasonable inferences of impropriety." *Id.* at 805.

132. ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 109 (discussion draft 1980).